Empire Janitorial Sales & Service, LLC *and* United Labor Unions, Local 100. Case 15–CA–146938

November 3, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On May 16, 2016, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Empire Janitorial Sales & Service, LLC, Metairie, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All custodial and maintenance employees employed by Empire Janitorial Sales & Service, LLC at OPSB facilities in the New Orleans metropolitan area. Excluded: Office clerical employees, professional employees, guards and supervisors as defined in the Act."

2. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its facility in Metairie, Louisiana, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized repre-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Although Member Miscimarra agrees that the Respondent is a successor employer, he does not agree that the successor bar precludes the Respondent from challenging the Union's majority status. As he has stated previously, Member Miscimarra disagrees with the successor-bar principles established in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), and would adhere to the standard as articulated in *MV Transportation*, 337 NLRB 770 (2002), under which an incumbent union in a successorship situation is entitled only to a *rebuttable* presumption of continuing majority status. See *FJC Security Services*, 360 NLRB No. 115, slip op. at 1–4 (2014) (concurring opinion of Member Miscimarra). Because the Respondent has failed to show that it had a valid basis for contesting the Union's majority status under any standard, Member Miscimarra finds it unnecessary to rely on *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), cited by the judge, or to pass on whether *Levitz* was correctly decided. Accordingly, he agrees that the Respondent violated Sec. 8(a)(5) of the Act when it unlawfully failed to recognize and bargain with the Union.

[3] Although the Respondent excepted to the judge's finding that it unlawfully refused to recognize the Union in violation of Sec. 8(a)(5) and (1), it has not argued that the judge's recommended affirmative bargaining order is improper, even assuming the Board affirms the judge's finding. We therefore find it unnecessary to provide a specific justification for this affirmative bargaining order. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001). See also *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002). Member Miscimarra believes the Board should evaluate the appropriateness of an affirmative bargaining order, which is an "extraordinary remedy," *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1461 (D.C. Cir. 1997), by giving "due consideration to the employees' section 7 rights," determining whether "other purposes . . . override the rights of the employees to choose their bargaining representatives," and evaluating whether "other remedies, less destructive to employees' rights, are . . . adequate." *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 46 (D.C. Cir. 1980); see also *Lee Lumber*, above, 117 F.3d at 1460–1462. However, he agrees that such an evaluation is unnecessary here, given the absence of exceptions to the bargaining order.

Although no party requested posting of the Board notice in both English and Spanish or excepted to the judge's failure to require a bilingual posting, the Board has the authority to consider remedial issues sua sponte. See, e.g., *J. Picini Flooring*, 356 NLRB 11, 12 fn. 5 (2010); *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996) ("It is also firmly established that remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions."). Here, given evidence that at least one employee of the bargaining unit speaks only Spanish and thus would not understand an English-only notice, we shall modify the judge's recommended Order to require the Respondent to post notices in both English and Spanish. See, e.g., *Eastern Essential Services*, 363 NLRB No. 176, slip op. at 1 fn. 3 (2016); *Barnard College*, 340 NLRB 934, 934 fn. 3 (2003) (Board ordered notice to be posted in English and Spanish where two discriminatees had limited proficiency in English). Under the circumstances here, Member Miscimarra would not require a bilingual posting where it was not requested by the General Counsel or the Charging Party.

We shall modify the judge's recommended Order to reflect the remedial change and to conform to the Board's standard remedial language, and shall substitute a new notice to conform to the Order as modified.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sentative, shall be posted by the Respondent in English and Spanish and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 2015."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. November 3, 2016

_____
Mark Gaston Pearce, Chairman

_____
Philip A. Miscimarra, Member

_____
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All custodial and maintenance employees employed by Empire Janitorial Sales & Service, LLC at OPSB facilities in the New Orleans metropolitan area. Excluded: Office clerical employees, professional employees, guards and supervisors as defined in the Act.

EMPIRE JANITORIAL SALES & SERVICE, LLC

The Board's decision can be found at www.nlrb.gov/case/15–CA–146938 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Andrew Miragliotta, Esq., for the General Counsel.
Michael Tusa, Esq., for the Respondent.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the General Counsel alleges that Empire Janitorial Sales and Service, LLC (Respondent) unlawfully failed and refused to bargain with United Labor Unions, Local 100 (the Union) when the Union requested bargaining in February 2015. The General Counsel and the Union maintain that Respondent was obligated to bargain with the Union because Respondent is a successor

employer, and because a majority of the employees in Respondent's bargaining unit were former employees of Respondent's predecessor, GCA Services Group, Inc., and therefore were represented by the Union.

Respondent asserts that it did not have an obligation to recognize and bargain with the Union because: the Union did not have majority support in February 2015; Respondent is not a successor employer; and Respondent was not sufficiently staffed until April 2015, at which time the Union did not represent a majority of the employees in Respondent's bargaining unit. Respondent also raised due process objections to the Board's Rules governing whether and when the General Counsel must disclose documents to Respondent.

As explained below, I find that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) as alleged in the complaint.

STATEMENT OF THE CASE

This case was tried in New Orleans, Louisiana, on March 16, 2016. The Union filed the charge in Case 15–CA–146938 on February 24, 2015, and amended that charge on April 9 and 29, and May 11, 2015.[1]

The General Counsel issued a complaint in Case 15–CA–146938 on February 8, 2016. In the complaint, the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, since on or about February 5, 2015, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit. Respondent filed a timely answer denying the alleged violations in the complaint.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT[3]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Metairie, Louisiana, provides janitorial, custodial and maintenance services. Respondent annually derives gross revenues in excess of $500,000, and annually purchases and receives goods and materials at its Metairie, Louisiana facility that are valued in excess of $5000 and come directly from points outside the State of Louisiana. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The dispute in this case arises out of the Orleans Parish School Board's (OPSB) periodic efforts to hire a contractor to provide janitorial, custodial and maintenance services in its facilities between 2009 and 2015. At different points in that timeframe, Respondent and GCA Services Group, Inc. (GCA Services) submitted competing bids to provide those services to the OPSB. As described in more detail below, the OPSB selected GCA Services' bids for certain contracts between 2009 and 2014. In January 2015, however, the OPSB selected Respondent's bid to begin providing janitorial, custodial and maintenance services to the OPSB. The General Counsel and the Union maintain that Respondent unlawfully failed and refused to bargain with the Union after Respondent hired several former GCA Services employees and began providing services to the OPSB under the January 2015 contract.

B. Initial GCA Services Contracts with the Orleans Parish School Board

1. Contracts for custodial and janitorial services

In March 2009, GCA Services began providing custodial, maintenance and landscaping services to the OPSB. (GC Exh. 2(e) (p. 2).) Since that contract was only an emergency contract that lasted for the calendar year, in November 2009, the OPSB requested new proposals to provide custodial and janitorial services at the following four schools: Mary McLeod Bethune Elementary; Benjamin Franklin Elementary; McDonogh 35 Senior High School; and Eleanor McMain Magnet School. The specific custodial and janitorial services that the OPSB sought included, but were not limited to, the following services in school classrooms, lab areas, offices, restrooms, and common areas (e.g., hallways, stairwells, lobbies and elevators): cleaning, dusting, sweeping, mopping, vacuuming, and trash removal. (Jt. Exh. 1; GC Exh. 2(c); see also GC Exh. 2(d) (addenda to the November 2009 request for proposals).)

On December 15, 2009, the OPSB selected and approved GCA Services' proposal to provide janitorial and custodial services.[4] (Jt. Exh. 1 (p. 1); see also GC Exh. 2(b) (p. 4).) Accordingly, on January 1, 2010, the OPSB and GCA Services executed a contract for GCA Services to provide custodial and janitorial services to the OPSB at the four schools identified above. By its terms, the contract would remain in effect until January 1, 2013, with the OPSB retaining the option to extend the contract for one or 2 years. The contract identified the following scope of work:

> The Contractor shall furnish all labor, materials, equipment, and insurance necessary to perform and fully complete, in every respect, within the time frame herein specified, all work (hereinafter referred to as the "services") specified in the [re-

[1] All dates are in 2015, unless otherwise indicated.

[2] The transcripts and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: page 7, l. 14: "businesses" should be "witnesses"; page 40, l. 17: Mr. Tusa was the speaker; page 99, l. 22: "day" should be "say"; page 128, l. 3: "restaurants" should be "restrooms"; page 129, l. 2: "GCS" should be "GCA"; throughout the transcript: witness Stafford "Brigmac" should be witness Stafford "Brignac"; and "Charging Party Exhibits" should be "Respondent's Exhibits."

[3] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

[4] Respondent also submitted a proposal to provide custodial and janitorial services to the OPSB. (GC Exh. 2(e) (last page); Tr. 40.)

quest for proposals] and Contractor's Response thereto, for the following:

Custodial and Janitorial Services for the following OPSB School Sites:

(a) Benjamin Franklin Elementary
(b) McDonogh #35
(c) McMain High School
(d) Bethune Elementary

(GC Exh. 2(b) (addresses of school sites omitted).)

2. Contracts for routine maintenance services

On April 28, 2011, the OPSB requested proposals to provide routine maintenance services at OPSB school sites. (GC Exh. 2(g); see also GC Exh. 2(h)–(j) (addenda to the April 28, 2011 request for proposals).) The OPSB's request included preventive maintenance services in the following areas (among others): walkways and parking areas; fencing, building foundation and structure system; roofing; windows and doors; building interior finishes; mechanical systems (e.g., boilers, water heaters; electrical and lighting; and life/safety (e.g., testing fire alarms, sprinkler system.) In connection with its request for proposals, the OPSB expected its contractor to have technicians, carpenters, plumbers, electricians, pipefitters, and welders available to perform the work in the OPSB's facilities. (GC Exhs. 2(g) (pp. 10–12); 2(k) (pp. 10–12).) In addition, the OPSB expected its contractor to perform some landscaping duties (e.g., caring for lawns, trees and shrubs). (GC Exh. 2(i) (p. 2).)

On June 22, 2011, GCA Services submitted its proposal to handle routine maintenance at OPSB schools. (GC Exh. 2(k).) The OPSB selected and approved GCA Services' proposal, and accordingly, on August 16, 2011, GCA Services and the OPSB executed a contract for routine maintenance services for OPSB schools. The contract was effective for 3 years, and identified the following scope of work:

> Contractor agrees to provide for the timely and efficient removal, repair, replacement, and/or installation of Routine Maintenance items, inspections, and preventative maintenance in the existing OPSB School Sites, all as more particularly described in [the request for proposals].
>
> It is the intent of this Agreement that Contractor shall provide 24-hour on-call repair service including the labor, equipment, supervision, and where requested by the Executive Director of Operations for OPSB, the materials necessary and reasonably ncidental to the routine maintenance repairs at the OPSB school sites. All work to be done in accordance with the specifications referenced in [the request for proposals] and applicable codes.

(GC Exh. 2(f) (pp. 4–7).)

C. June 2012—Union Certified as Representative of Certain GCA Services Employees

On June 18, 2012, the Board issued a certification of representative that identified the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All custodial, maintenance and landscaping employees employed by [GCA Services] at its school worksites in the New Orleans metropolitan area. Excluded: Office clerical employees, professional employees, guards and supervisors as defined in the Act.

(GC Exh. 3; see also Tr. 44–46, 63, 80–82.)

On October 5, 2012, GCA Services and the Union executed a collective-bargaining agreement covering the bargaining unit specified above. In that agreement, GCA Services recognized the Union as the sole and exclusive representative of all of [GCA Services'] employees in the bargaining unit. The collective-bargaining agreement was effective for 3 years, and would continue to be in full force and effect for additional one-year periods unless the Union or GCA Services provided timely written notice of a desire to change, modify or terminate the agreement. (GC Exh. 4 (Arts. 1 and 18); Tr. 46–48, 63, 80–82.)

D. GCA Services Provides Custodial, Janitorial and Routine Maintenance Services at an Increasing Number of OPSB Facilities

With both a contract for custodial and janitorial services and a contract for routine maintenance services in place, GCA Services began providing services and submitting purchase orders to the OPSB for payment under the contracts. Some of the purchase orders related to the original four school facilities (i.e., Mary McLeod Bethune Elementary; Benjamin Franklin Elementary; McDonogh 35 Senior High School; and Eleanor McMain Magnet School) identified in the January 2010 contract for custodial and janitorial services. (See, e.g., GC Exh. 2(l) (pp. 1, 5, 7, 12, 14–15, 21–22, 26–28, 34, 44, 47–52, 55); GC Exh. 2(m)–(n); GC Exh. 7 (pp. 2, 5).) However, GCA Services also provided custodial, janitorial and maintenance services at several other OPSB facilities, including but not limited to:

4422 General Meyer Building
4460 General Meyer Building
Benjamin Franklin Elementary Extension
Central Office Timbers Park Building
Mahalia Jackson Elementary
Priestley
Robert Moton Elementary

(GC Exh. 2(l) (pp. 5, 8, 12, 17, 20, 22, 24, 26–27, 29–30, 40–43, 46–50, 54–55); GC Exh. 2(m)–(n); GC Exh. 7 (p. 7, 9); Tr. 91, 96–97.)[5] GCA Services provided a broad range of maintenance services in OPSB facilities in this timeframe, including (but not limited to) the following:

(a) Carpentry—such as replacing damaged flooring;
(b) Electrical—such as replacing light bulbs and repairing/replacing outlets and switches;

[5] Additional facilities included: A. P. Tureaud; Einstein Charter School; Holy Ghost Elementary School; Jo Ellen Smith; Karr High School; McDonogh #7; New Orleans Free School; and Youth Study Center. (GC Exh. 2(l) (pp. 2, 10–11, 16, 18–19, 23, 25, 27, 31–33, 35–39, 45); GC Exh. 7 (p. 1).)

(c) HVAC—such as repairing/maintaining boilers[6] and chillers;
(d) Plumbing—such as repairing toilets, flush valves and water lines;
(e) Painting—such as touch up painting on drywall; and
(f) Exterior—such as checking drainage and roofing.

(Tr. 91–93; see also GC Exh. 2(l) (pp. 1–2, 7–9, 14–21, 23–35, 37, 39–40, 42, 44–46, 51–55; GC Exh. 7 (pp 1–10).)[7]

E. Fall 2014—The OPSB Issues a Request for Proposals for Custodial, Janitorial and Maintenance Services

As the existing contracts with GCA Services for custodial, janitorial and maintenance services came to a close, the OPSB decided to consolidate the services in a single contract. (Tr. 97–98.) Accordingly, on September 19, 2014, the OPSB issued a request for proposals to provide custodial, janitorial and maintenance repair services in the following facilities:

School Sites

Benjamin Franklin Elementary;
Benjamin Franklin Elementary Extension
Eleanor McMain Magnet School
Mahalia Jackson Elementary
Mary McLeod Bethune Elementary;
McDonogh 35 Senior High School;

Office Buildings

4422 General Meyer Building
4460 General Meyer Building
Central Office Timbers Park Building (3520 General DeGaulle Building)

Vacant Sites

Benjamin Franklin Elementary Extension—Lodge
Carrollton Court House
Priestley
Robert Moton Elementary

(Jt. Exh. 2 (pp. 2, 51–53); Jt. Exh. 13 (pars. 7–8).)

The custodial and janitorial services that the OPSB required were virtually identical to those that the OPSB required when it issued its November 2009 request for proposals. Specifically, the OPSB sought the following custodial and janitorial services (among others) in classrooms, lab areas, offices, restrooms and common areas (e.g., hallways, stairwells, lobbies and elevators): cleaning, dusting, sweeping, mopping, vacuuming, and trash removal. (Compare Jt. Exh. 2 (pp. 30, 32–44) (Sept. 2014 request for proposals) with GC Exh. 2(c) (pp. 21–34) (Nov. 2009 request for proposals); (see also Findings of Fact (FOF) sec. II(B)(1), supra).

As for maintenance, the OPSB expected its contractor to provide preventive maintenance, semi-annual facility inspections, and corrective maintenance, as long as the maintenance was "basic" in nature (i.e., maintenance that would cost $5000 or less). (Jt. Exh. 2 (pp. 29, 45–49); Jt. Exh. 3 (p. 1).) The OPSB expected its contractor to provide preventive maintenance on the following systems (among others):

(a) HVAC;
(b) Plumbing and fixtures;
(c) Roofing;
(d) Life safety and security systems;
(e) Interior finishes (including paint, flooring, woodwork, walls and ceilings);
(f) Doors and windows;
(g) Structural components;
(h) Exterior finishes; and
(i) Exterior equipment (including parking areas, fencing and playground equipment).

(Jt. Exh. 2 (p. 45).)

The OPSB also expected its contractor to develop a program to address corrective maintenance issues in a timely manner based on the nature of the maintenance request. Corrective maintenance services could include, but were not limited to:

(a) Carpentry—such as repairing/replacing damaged flooring, doors, furniture or ceiling tiles;
(b) Electrical—such as repairing/replacing service panels, main switch gear, breakers and lighting;
(c) HVAC—such as repairing/maintaining chillers, cooling towers, filters, thermostats and motors;
(d) Plumbing—such as repairing/replacing faucets, fixtures, water heaters, pipes and boilers;
(e) Painting—such as touch up painting in interior or exterior areas;
(f) Exterior—such as checking drainage and clearing drains, gutters and leaders; and
(g) Other—such as maintaining building energy management, heating and cooling systems.

(Jt. Exh. 2 (pp. 45–49); Tr. 145–148.)[8]

Finally, the OPSB expected its contractor to inspect facilities semiannually to identify: deficiencies in preventive maintenance; needed repairs; and needed capital or major maintenance projects. (Jt. Exh. 2 (p. 45).) The OPSB did not request any landscaping services in its request for proposals to provide

[6] The work on boilers has also been characterized as plumbing work. (See Jt. Exh. 2 (p. 48) (September 2014 request for proposals to do custodial, janitorial and maintenance for the OPSB).)

[7] GCA Services provided both basic and major maintenance services to the OPSB. (Tr. 95.) However, if GCA Services proposed maintenance work with a materials cost that would exceed a certain "competitive threshold," then the OPSB was required to seek bids from contractors to perform the work (including GCA Services, if it wished to submit a bid). On the other hand, for maintenance work that would include a materials cost of $5000 or less, the OPSB had the option of simply having GCA Services perform the work. (See GC Exhs. 2(f) (p. 8.); 2(g) (p. 11); see also GC Exh. 7 (pp. 11–26) (OPSB contracts based on successful bids by GCA Services to do repairs such as removing/replacing boilers or chillers in certain OPSB facilities).)

[8] The OPSB set a limit on the cost of maintenance that its selected contractor should perform under the maintenance contract. For basic maintenance that cost $5000 or less, the contractor could perform the work. However, for major maintenance costing more than $5000 and having a useful life of at least 3 years, the contractor would need to submit three written quotes for performing the specific major maintenance project. (See Jt. Exh. 2 (pp. 31, 49) (explaining the difference between basic maintenance and major maintenance); Tr. 148–149.)

custodial, janitorial and maintenance services. (See Jt. Exh. 2; see also Jt. Exh. 13 (par. 27) (noting that Respondent does not provide any landscaping services under its contract with OPSB).)

F. December 2014—The OPSB Selects Respondent's Proposal to Provide Custodial, Janitorial and Maintenance Services to the OPSB

In October 2014, both Respondent and GCA Services submitted proposals to provide custodial, janitorial and maintenance services to the OPSB.[9] When Respondent submitted its proposal, it was not aware that the Union represented GCA Services' employees who provided services in OPSB facilities, and also was not aware that there was a collective-bargaining agreement between the Union and GCA Services. (Jt. Exhs. 2, 13 (pars. 9–10, 13); Tr. 16, 23–25, 28, 82–83, 93.)

On or about December 16, 2014, the OPSB selected Respondent's proposal to provide custodial, janitorial and maintenance services to the OPSB. (Jt. Exh. 13 (pars. 9, 12); Tr. 27, 93–94.)

F. January 2015—Respondent Prepares to Provide Services to the OPSB and Signs a Contract with the OPSB

1. Respondent's preparations to provide services to the OPSB

In January 2015, Respondent arranged site visits to each of the schools that it would be servicing for the OPSB. In those visits, Respondent's operations manager, Dayle Hernandez met with employees who were working for GCA Services to advise them that Respondent would begin providing custodial and janitorial (and maintenance) services starting on February 2, 2015, and to encourage those employees to fill out applications to work for Respondent in the same positions that they held for GCA Services. (Tr. 101–103, 106–107, 123–125, 129.)

2. Respondent's contract with the OPSB

On January 31, 2015, Respondent and the OPSB executed a contract for custodial, janitorial and maintenance repair services. The contract was effective for 3 years, and could be renewed for two additional 1-year periods. (Jt. Exhs. 7 (p. 7); 13 (par. 15); Tr. 27.)

Under the contract, Respondent was responsible for providing custodial, janitorial and maintenance/repair services at the following schools:

Benjamin Franklin Elementary;
Benjamin Franklin Elementary Extension
Eleanor McMain Magnet School
Mahalia Jackson Elementary
Mary McLeod Bethune Elementary; and
McDonogh 35 Senior High School.

Respondent was also responsible for providing maintenance/repair services at the following office buildings and vacant facilities:

4422 General Meyer Building
4460 General Meyer Building
Benjamin Franklin Elementary Extension – Lodge (vacant)
Carrollton Court House (vacant)
Central Office Timbers Park Building (3520 General DeGaulle Building)[10]
Priestley (vacant)
Robert Moton Elementary (vacant)

The parties agree that the janitorial and custodial work under Respondent's contract with OPSB is the same as the janitorial and custodial work that GCA provided under its contract with OPSB, except that Respondent is not required to clean trash containers in restrooms or classrooms, and Respondent is required to pressure wash walkways. The parties also agree that Respondent does not perform any landscaping work for the OPSB under the contract. (Jt. Exh. 13 (pars. 15–19, 27); Tr. 29.) As for maintenance work, Respondent provided the preventive and corrective maintenance work set forth in the OPSB's September 2014 request for proposals. (See Findings of Fact, Section II(E), supra; Tr. 145–148, 150–153.)

G. February 2015—Respondent Begins Providing Services to the OPSB under the Custodial, Janitorial and Maintenance Repair Services Contract

On February 2, 2015, Respondent, using its own management team (Respondent did not hire any supervisors from GCA Services), began providing custodial, janitorial and maintenance repair services to the OPSB. Although there was limited time between GCA Services' last day and Respondent's first day of working in OPSB schools (GCA Services ended its work on January 31, and Respondent started on February 2) and OPSB schools were in the middle of the school year, the transition was relatively seamless. In part because Respondent hired several former GCA Services employees, Respondent had enough employees to start work on its contract with OPSB as scheduled on February 2. Almost all[10] of the former GCA Services employees who agreed to work for Respondent continued to work in the same OPSB facility as they had with GCA Services, and continued to carry out their usual dusting, cleaning, sweeping, mopping and waxing tasks (albeit with a different uniform to wear and some different cleaning products to use). (Tr. 15, 21–23, 28, 51, 103–106, 121–123, 125, 129, 142; see also Jt. Exh. 10 (indicating that 21 of the 30 employees that Respondent used for the OPSB contract on February 2 were former GCA Services employees, and that 26 of the 30 employees were part-time or full-time custodians); GC Exh. 5 (indicating that as of January 28, 2015, GCA Services had 37 part-time and full-time custodians that worked in OPSB facilities); Jt. Exh. 11 (OPSB school district calendar).)

[9] There is no dispute that Respondent and GCA Services are separate entities. The companies do not have any shared officers, directors or owners, and Respondent did not purchase any equipment or supplies from GCA Services after the OPSB selected Respondent's proposal to provide custodial, janitorial and maintenance services. (Jt. Exh. 13 (pars. 4–6, 14); see also Tr. 21–23.)

[10] It appears that Respondent also provided custodial work at the Central Office Timbers Park building. (See Jt. Exh. 10 (listing one custodial employee assigned to that location).)

[10] As of February 3, 21 out of 23 former GCA Services employees who worked for Respondent were placed at the same OPSB facility where they worked under GCA Services. (Compare Jt. Exh. 10 with GC Exh. 5.)

During and shortly after February 2015, the number of nonmanagerial employees that Respondent used to perform the work for the OPSB varied due to some employee turnover. Accordingly, Respondent's staffing levels were as follows for its first few months servicing the OPSB contract:[11]

Date (2015)	**Number of former GCA Services employees in the bargaining unit working for Respondent on the OPSB contract[12]**	**Total number of employees in the bargaining unit working for Respondent on the OPSB contract**
February 2	21 (all custodians)	30 (26 custodians; 4 maintenance)
February 3	23 (all custodians)	35 (31 custodians; 4 maintenance)
February 5	22 (all custodians -- employee R.B. not included due to termination on February 5)	35 (31 custodians; 4 maintenance)
February 11	22 (all custodians)	38 (34 custodians; 4 maintenance)
March 2	18 (all custodians)	41 (38 custodians; 3 maintenance)
April 1	17 (all custodians)	39 (36 custodians; 3 maintenance)
April 15	16 (all custodians)	41 (38 custodians; 3 maintenance)
April 30[13]	15 (all custodians)	36 (33 custodians; 3 maintenance)

(Jt. Exh. 10; see also Jt. Exh. 13 (pars. 22, 24–25); GC Exh. 5 (identifying employees who worked for GCA Services as custodians in OPSB facilities as of January 28, 2015); Tr. 33–34, 130.) To the extent that any staffing shortfalls arose during this time period, Hernandez and one other manager occasionally stepped in to handle custodial or janitorial assignments. (Tr.

[11] All employees assigned to one of the six OPSB schools did custodial work. Similarly, the one employee assigned to the Central Office Timbers Park building did custodial work. Respondent also employed 3–4 "maintenance and repair" employees who exclusively handled that type of work, and did not perform any custodial work. Finally, starting in late February 2015, Respondent employed a few (usually 3) employees in a "floater" position, meaning that those employees could be assigned to perform custodial work at any location where they were needed (e.g., due to employee absences or staffing shortages). (Jt. Exh. 10; Tr. 30–32, 39, 129–130, 144–145.)

[12] The parties dispute whether employees D.P. and D.J. should count as former GCA Services employees. (Tr. 135–136 (discussing Jt. Exh. 10); see also GC Posttrial Br. at 7 fn. 3; R. Posttrial Br. at 11 fn. 19).) In support of its argument concerning D.P., the General Counsel observes that D.P. is listed as an employee on the last page of GC Exh. 7, which lists employees who worked in OPSB facilities. However, Respondent points out that D.P. is not listed as an employee on GC Exh. 5, which is also a list of employees who worked in OPSB facilities. Since these two exhibits conflict as to D.P.'s status as a former GCA Services employee and I do not have a basis to credit one exhibit over the other, I find that the General Counsel did not prove that D.P. (or D.J., who apparently stopped working for GCA Services on January 14, 2015, and then was hired by Respondent on February 2, 2015 (see GC Exh. 7 (p. 27); Jt. Exh. 10)) should be counted as former GCA Services employees, and my decision on that issue is reflected in the employee counts stated in the table. I note that my decision to count former GCA employees in this manner (with D.P. and D.J. not counted as former GCA Services employees) does not affect the outcome in this case.

[13] The parties stipulated that as of the date of trial (March 16, 2016), Respondent had 25 nonmanagerial employees in the bargaining unit that were providing services at OPSB facilities. (Jt. Exh. 13 (par. 26); see also R. Exh. 3.) Approximately 5 those 25 employees were former GCA Services employees. Although it may have been short staffed at the time of trial, Respondent was able to provide the services that the OPSB requires at its facilities. (Tr. 131–134 (noting that Hernandez occasionally assists with custodial work, and that as of the day of trial Respondent had a similar number of facilities to service for the OPSB as it did in February 2015); see also Jt. Exh. 10 (showing that 5 former GCA Services employees continue to work for Respondent).)

130–131.)

I. February 2015—Respondent Declines the Union's Request to Bargain

On February 5, 2015, the Union sent Respondent a letter to ask Respondent to bargain about a collective-bargaining agreement. (Tr. 19, 52.) The Union stated as follows in its letter:

> [The Union] is the certified representative and collective bargaining agent of [Respondent's] custodians that were employed by GCA.
>
> [Respondent] took over the provision of these services as employer of the custodians on or about February 2, 2015. You have now hired and retained fifty percent plus one of the GCA employees, therefore establishing [Respondent] as the successor employer and the party obligated to bargain with our union for the purposes of [effecting] a collective bargaining agreement.
>
> In confirming our majority over the last week we are requesting to begin collective bargaining as soon as possible to ensure the maximum stability of operations for workers and for your company. We will be available at your convenience to meet at any time or Monday, February 9, Wednesday February 11 and Friday February 13.

(Jt. Exh. 8; see also Jt. Exh. 13 (par. 21); GC Exh. 5 (the document that the Union used to determine how many former GCA Services employees Respondent hired); Tr. 19, 28, 52–54.)[14]

In a letter dated February 11, 2015, Respondent declined the Union's request to bargain, stating as follows:

> We were the successful proposer to provide Janitorial service to the OPSB effective February 02, 2015. We have not employed "fifty percent plus one" of the employees that were terminated by GCA as stated in your letter dated 02–05–2015.
>
> As a private sector employer in a Right to Work State we are not interested in negotiating a collective bargaining agreement.

(Jt. Exh. 9; see also Jt. Exh. 13 (par. 23); Tr. 19–20, 55.) Upon receiving the February 11, 2015 letter from Respondent, the Union attempted to reach Respondent by telephone in mid-February, and then filed ULP charges when Respondent did not call back in response to the Union's voice mail message. (Tr. 55.)

At trial, the General Counsel agreed that the Union's request that Respondent bargain only applies to Respondent's employees in the bargaining unit that work at OPSB facilities pursuant to Respondent's January 2015 contract to provide janitorial, custodial and maintenance services to the OPSB. Accordingly, the appropriate bargaining unit is:

> All custodial and maintenance employees employed by Respondent at OPSB facilities in the New Orleans metropolitan area. Excluded: Office clerical employees, professional employees, guards and supervisors as defined in the Act.

(Tr. 7–10; see also FOF, Section II(C) (describing GCA Services' bargaining unit); FOF, Section II(E) (noting that Respondent does not provide any landscaping services to the OPSB).)

J. Evidence and Witnesses during Trial

At the beginning of trial on March 16, 2016, Respondent, through counsel, objected to the Board's rules and procedures on due process grounds. In particular, Respondent objected that under the Board rules, Respondent does not receive advance notice of the General Counsel's witnesses or exhibits, and does not receive any statements of the General Counsel's witnesses until after the witness testifies. I overruled Respondent's due process objection because I am bound to follow the Board's rules. (Tr. 7–8.)

In its case in chief, the General Counsel called Union state director Rosa Hines to testify as one of its witnesses. (Tr. 41.) When cross examining Hines, Respondent showed Hines a copy of a subpoena that Respondent sent to the Union, and asked Hines if she had documents to produce in response to the subpoena.[15] Hines replied that she never received the subpoena. Respondent objected to the General Counsel's refusal to provide responsive documents in the Union's stead, and then completed its cross examination of Hines. (Tr. 57–62; R. Exh. 2.) At the conclusion of Hines' testimony, I asked Hines (off the record) if she would be able to return to the Union's office and search for documents that would be responsive to Respondent's subpoena. When Hines replied that she was due to be hospitalized in the afternoon, the parties and I agreed that due to her medical appointment, Hines could be released as a witness and from searching for documents (subject to being contacted by counsel if any need for followup arose). (Tr. 107–108; see also Tr. 86–87.)

Next, the General Counsel called former GCA Services manager Stafford Brignac as a witness. After Brignac answered questions in response to direct and cross examination, I excused Brignac (who had appeared pursuant to a subpoena served by the General Counsel). (Tr. 89–98.)

After another witness testified for the General Counsel, the General Counsel offered a group of documents (GC Exhs. 2(a)–2(m)) into evidence. Respondent objected to GC Exh. 2 on due process grounds because the exhibit included a lengthy group of documents that Respondent was receiving for the first time, and because Respondent did not have an opportunity to question Brignac about the documents. I overruled Respondent's due process objection, but I explained that I understood that Respondent would need time to review the exhibit, and I also explained that I would permit Respondent to recall Brignac and

[14] When GCA Services stopped providing services to the OPSB (and Respondent took over), approximately 12–15 GCA Services employees in the bargaining unit were paying union dues. Since Respondent did not follow the dues-checkoff authorizations that former GCA Services employees had with GCA Services, all members of the bargaining unit stopped paying union dues after Respondent began providing services to the OPSB. (Tr. 70–74, 87–88; see also GC Exh. 4 (Article 15—Dues Checkoff).)

[15] Respondent did not ask the Union to produce these documents at the beginning of trial, or during off the record discussions that the parties and I had before I opened the trial on March 16. (See Tr. 58.)

any other General Counsel witness for additional cross examination based on the materials in General Counsel Exhibit 2. In that connection, I instructed the General Counsel to notify Brignac (as well as other witnesses that Respondent might choose to identify) that he might be recalled for additional testimony. When the General Counsel asserted that it was not responsible for contacting Brignac for further testimony, I pointed out that, intentionally or not, the General Counsel waited until after Brignac departed before offering General Counsel Exhibit 2 into evidence. Because of that fact, I reiterated that the General Counsel was responsible for checking on Brignac's availability for further testimony. I also admitted General Counsel Exhibit 2 into evidence on a provisional basis, subject to any additional objections that Respondent might assert after reviewing the documents in more detail. (Tr. 108–112, 117.)

Later in the trial day, the General Counsel reported that it attempted to reach Brignac by telephone, but could not leave a message on Brignac's voicemail (the voicemail system was full, or otherwise was not functioning). The General Counsel also reported that it had limited contact with Brignac before trial—a Board agent served Brignac with a subpoena to testify, but otherwise the General Counsel had no contact with Brignac until Brignac appeared to testify on the day of trial. I instructed the General Counsel to advise me and Respondent if the General Counsel received more information about Brignac's availability, and instructed Respondent to continue to review General Counsel Exhibit. 2 to determine if Brignac was needed for further testimony, and to determine if Respondent might have stipulations to propose to the General Counsel. (Tr. 117–118.)

After the General Counsel rested its case in chief, Respondent gave its opening statement and presented its case in chief.[16] (Tr. 137–153.) Respondent then rested its case without asking to recall Brignac or any other witness for further questioning based on the documents in General Counsel Exhibit 2, and without asking to continue the trial to a later date to allow time to recall any witnesses who were not available. The General Counsel did not present a rebuttal case. Accordingly, I closed the trial. (Tr. 154–155.)

Discussion and Analysis

A. Respondent's Due Process Objections

In its posttrial brief, Respondent renewed its argument that the Board's Rules violate Respondent's due process rights by allowing the General Counsel to "withhold documents to the prejudice of [Respondent]." (See R. Posttrial Br. at 11–13.) The General Counsel and I, of course, are bound to follow the Board's Rules, including Board Rule 102.118, which prohibits Board employees (including counsel for the General Counsel and administrative law judges) from producing files or documents in response to a subpoena without the express written consent of either the Board or the General Counsel. Such consent has not been granted in this case. Accordingly, consistent with well-established precedent, I find that Respondent's due process objection to the applicable Board Rules lacks merit. See *Finley Hospital*, 362 NLRB No. 102, slip op. at 1 fn. 2 (2015) (finding no merit to the respondent's argument that the Board Rules violate the Administrative Procedure Act and the due process clause of the Fifth Amendment to the United States Constitution because the rules allow the General Counsel to request trial information from a respondent, but do not impose a corresponding duty on the General Counsel); *Success Village Apartments, Inc.*, 347 NLRB 1065, 1065 (2006) (rejecting the respondent's argument that it was prejudiced by the General Counsel's refusal, based on Board Rule 102.118(b)(1), to provide a witness' statement until after the witness testified). Respondent remains free to ask the Board to change its rules. See *Professional Medical Transport, Inc.*, 346 NLRB 1290, 1297 fn. 6 (2006) (explaining that requests to change Board Rules are more appropriately addressed to the Board).

Respondent also takes issue, on due process grounds, with the fact that the General Counsel did not offer or present General Counsel Exhibit 2 as evidence (or otherwise disclose those documents to Respondent) until after witnesses Hines and Brignac completed their testimony and were excused. (See R. Posttrial Br. at 8 fn. 12, 11–13.) As a preliminary thought on that issue, I note that Respondent's argument about General Counsel Exhibit 2 raises the same issues (discussed above) about the Board's Rules that must be presented to the Board. In addition, however, I find that Respondent waived any objections concerning General Counsel Exhibit 2 and Hines' and Brignac's availability for questioning about that exhibit. Indeed, although I stated explicitly that I would allow Respondent to recall any witnesses it needed for additional questions based on General Counsel Exhibit 2, Respondent did not ask that either Hines or Brignac be recalled, and also did not ask that the trial be continued to allow time (if needed) to bring those witnesses back for additional testimony. Instead, Respondent presented and then rested its case. (See FOF, Section II(J).) Under those circumstances, Respondent cannot now assert that it did not have an opportunity to question witnesses about General Counsel Exhibit 2. Accordingly, General Counsel Exhibit 2 will remain in the evidentiary record as a properly admitted exhibit.

B. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 13–14 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a

[16] Respondent presented some of its evidence earlier in the trial by completing its direct examination of witnesses that the General Counsel called for cross examination under Rule 611(c) of the Federal Rules of Evidence. (See Tr. 20, 128 (regarding witnesses Charles Lusco and Dayle Hernandez).)

witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 14. To the extent that I have made them, my credibility findings are set forth above in the findings of fact for this decision.

C. Complaint Allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since on or about February 5, 2015, failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit. In connection with that allegation, the General Counsel maintains that: (a) Respondent is a successor employer to GCA Services; and (b) Respondent has an obligation under the Act to recognize and bargain with the Union because a majority of employees in Respondent's bargaining unit were employed by GCA Services and therefore are represented by the Union. I address each of those issues below, as well as Respondent's defense that it did not have to bargain with the Union because the Union did not have majority support in February 2015.

D. Is Respondent a Successor Employer to GCA Services?

1. Applicable legal standard

To determine whether a new employer is the successor employer to the previous employer, the Board considers the totality of the circumstances to evaluate whether there is a substantial continuity between the two companies. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). Specifically, the Board considers the following factors:

> whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Id.; see also *Galion Pointe, LLC*, 359 NLRB 699, 715 (2013), affd. in 361 NLRB No. 135 (2014). In conducting the analysis, the Board keeps in mind the question whether those employees who have been retained will understandably view their job situations as essentially unaltered. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 43.

2. Analysis

The evidentiary record establishes that GCA Services and Respondent are competitors in the same business of providing custodial, janitorial and maintenance services. There is no dispute that Respondent and GCA Services are separate entities with distinct owners, contractual obligations and equipment. (FOF, sec. II(F).)

However, when the OPSB selected Respondent to begin providing custodial, janitorial and maintenance services in OPSB facilities in 2015, Respondent essentially picked up where GCA Services left off, with no break in service even though it was the middle of the school year. To accomplish that quick turnaround, Respondent: hired several custodial employees who had been working for GCA Services in OPSB facilities; placed almost all of those employees in the same facilities where they had worked for GCA Services; and instructed those employees to continue carrying out the same custodial duties (e.g., dusting, cleaning, sweeping, mopping, and waxing). (FOF, Section II(H).)

Respondent also picked up where GCA Services left off regarding maintenance services in OPSB facilities. The evidentiary record shows that GCA Services provided a wide range of routine maintenance services to the OPSB, including carpentry, electrical, HVAC, plumbing, painting, and exterior maintenance work, as long as the materials cost was $5000 or less (for more expensive projects, the OPSB solicited bids, and GCA Services could compete for the project). (FOF, Section II(D).) Although Respondent hired new maintenance workers when it began providing maintenance services to the OPSB, Respondent provided a similar range of maintenance services, with a focus on essentially the same preventive and corrective maintenance work (i.e., carpentry, electrical, HVAC, plumbing, painting, and exterior maintenance work that cost $5000 or less). (FOF, Section II(E) (noting that Respondent could bid to perform maintenance work that cost more than $5000), (G)(2), (H).)

To be sure, Respondent and GCA Services did not provide identical services to the OPSB. First, there are some minor differences in the contracts that Respondent and GCA Services had with the OPSB, such as: Respondent not performing any landscaping work (GCA Services did); Respondent performing work in two more OPSB facilities (Benjamin Franklin Elementary Extension—Lodge and Carrollton Court House) than GCA Services; and Respondent having slightly different guidelines than GCA Services to follow when proposing major maintenance work (work that would cost more than $5000). (Compare FOF, Section B, D (describing GCA Services' agreements with the OPSB) with FOF, Section E, G (describing Respondent's agreement with the OPSB).) Second, Respondent brought in its own supervisors and maintenance employees,[17] and provided its new custodial employees with a different uniform to wear and some different cleaning products to use. (FOF, Section H.) All of those differences, however, were at the margins of the services that Respondent and GCA Services provided—more generally, the evidentiary record shows substantial continuity between GCA Services and Respondent because GCA Services provided custodial, janitorial and maintenance services to the OPSB from 2009 through January 2015, and Respondent essentially took GCA Services' place when the OPSB selected Respondent's proposal to begin providing those services starting in February 2015. Indeed, the GCA Services employees that Respondent hired understandably viewed their job situations as essentially unaltered. Respondent, through Hernandez, met with GCA Services custodians to encourage them to apply to work for Respondent in the same positions that they held with GCA Services. The custodians that took Respondent up on that offer did just that, leaving work on January 31, 2015, as GCA Services employees, and returning to work on February 2, 2015, to carry out their same custodial duties in OPSB facilities as Respondent's employees.

[17] Maintenance employees counted for a relatively small portion of the bargaining unit. Indeed, in February 2015, only 4 employees in the 30–38 employee bargaining unit were maintenance employees (with the remainder being custodial employees). (FOF, Sec. II(H).)

Based on the foregoing analysis, I find that the General Counsel demonstrated that there is a substantial continuity between Respondent and GCA Services. Accordingly, I find that Respondent is the successor employer to GCA Services for employees who provided custodial, janitorial and maintenance services in OPSB facilities. See *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063–1064 (2001) (finding substantial continuity between the predecessor and successor because although the successor provided a different supervisor, different pay rates and benefits, and newer buses to drive than the predecessor, the employee bus drivers were performing the same work that they performed for the predecessor); *M.S. Management Associates, Inc.*, 325 NLRB 1154, 1155 (1998) (finding substantial continuity where the successor provided the same housekeeping and HVAC services to the same set of customers and with the same equipment, with no hiatus in operations, and even though the successor used a different supervisory staff), enfd. 241 F.3d 207 (2d Cir. 2001).

E. Was Respondent Obligated to Bargain with the Union as a Successor Employer?

1. Applicable legal standard

The triggering fact for when a successor employer becomes obligated to bargain is when a majority of employees in the successor employer's bargaining unit were employed by the predecessor (and therefore are represented by the union). *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 46. In some instances, the successor's obligation to bargain begins immediately, because the successor immediately begins providing a full range of operations and a majority of the employees in the successor's bargaining unit are represented by the union. By contrast, when a successor employer gradually builds its operations and hires employees during an initial startup period, the Board does not evaluate whether the successor has an obligation to bargain until the successor has hired a substantial and representative complement of its work force.[18] (Id. at 46–47.) To decide whether a substantial and representative complement exists in a particular employer transition, the Board considers: whether the job classifications designated for the operation were filled or substantially filled; whether the operation was in normal or substantially normal production; and the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work, as well as the relative certainty of the employer's expected expansion. Id. at 48–49; see also *Galion Pointe, LLC*, 359 NLRB 699, 716–717.

2. Analysis

When Respondent began providing janitorial, custodial and maintenance services to the OPSB on February 2, a majority of employees in the bargaining unit (21 out of 30 employees) were former GCA Services employees and therefore represented by the Union.[19] That majority held true when the Union contacted Respondent on February 5 to request bargaining (22 out of 35 employees were represented by the Union), and also held true on February 11 when Respondent declined the Union's request to bargain (22 out of 38 employees were represented by the Union). (FOF, sec. II(H).) Since Respondent was already providing a full range of operations and services to the OPSB at those times (indeed, Respondent made a point of being ready to provide services to the OPSB on February 2), I find that Respondent became obligated to bargain with the Union, on request, on February 2, 2015.

I am not persuaded by Respondent's argument that it was gradually building up operations in February 2015, and did not hire a substantial and representative complement of its work force until April 2015. Contrary to that argument, Respondent hired four maintenance employees by February 2, and never exceeded that number in the relevant time period. As for custodial employees, Respondent had 34 custodians on staff on February 11—while that number increased slightly to 38 at times in March and April 2015, that increase in custodial staffing can hardly be said to be substantial, particularly when Respondent hired most of its new custodians to be "floaters" who were available to fill in when other employees were absent. And perhaps most important, the evidentiary record shows that although Respondent was still "staffing up" to a limited degree in early February, Respondent nonetheless was able to provide a full range of custodial and maintenance services to the OPSB on February 2 to avoid having a break in service after taking over for GCA Services.

Since a majority of employees in Respondent's bargaining unit were employed by GCA Services and represented by the union on February 2, 2015, I find that Respondent had an obligation to bargain with the Union when the Union requested bargaining on February 5, 2015.

F.. Can Respondent Avoid its Obligation to Bargain with the Union as a Successor Employer by Asserting that the Union Lost the Support of a Majority of Employees in the Bargaining Unit?

1. Applicable legal standard

In *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), the Board reinstated the "successor bar" rule. As the Board explained, the successor bar rule applies where a successor em-

[18] If the union asks the successor employer to bargain before the successor has hired a substantial representative complement of its work force, the union's premature request remains in force until the moment that the successor attains the substantial and representative complement. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 52.

[19] I find that the bargaining unit at issue here (all custodial and maintenance employees employed by Respondent at OPSB facilities in the New Orleans metropolitan area) is an appropriate bargaining unit. (See FOF, sec. II(I).) In making this finding, I note that it does not matter in this context that the bargaining unit at issue here is smaller than GCA Services' bargaining unit (which included custodial, maintenance and landscaping employees who worked for GCA Services in both OPSB and non-OPSB school worksites in the New Orleans metropolitan area). See *M.S. Management Associates, Inc.*, 325 NLRB at 1155 ("It is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to a sale or transfer to a new owner, so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation.").

ployer has abided by its legal obligation to recognize an incumbent union, and the "contract bar" is inapplicable. "In such cases, the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised through a petition for election raised by employees, by the employer, or by a rival union; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period." Id. at 808. In reinstating the successor bar rule, the Board explained that the rule is necessary to preserve industrial peace because successorship places the union in a peculiarly vulnerable position where everything that the union achieved through collective-bargaining with the predecessor is at risk of being eliminated, and that risk arises at a time when employees might be inclined to shun support for the union. Id. at 805–807.

The Board also defined the term "reasonable period of bargaining" for purposes of the successor bar rule. Specifically, "where the successor employer has expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes," the reasonable period of bargaining shall be 6 months, measured from the date of the first bargaining meeting between the union and the successor employer." (Id. at 809.) However, "where the successor employer recognizes the union, but unilaterally announces and establishes initial terms and conditions of employment before proceeding to bargain," the reasonable period of bargaining shall be a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the successor employer. (Id.) The party invoking the successor bar rule bears the burden of showing that a reasonable period of bargaining has not elapsed. (Id.)

2. Analysis

As part of its defense in this case, Respondent argues that it did not have an obligation to bargain with the Union because Respondent demonstrated at trial that the Union did not have the support of a majority of employees in the bargaining unit when Respondent began providing janitorial, custodial and maintenance services to the OPSB. In connection with that defense, Respondent asserted that the Union is only entitled to a rebuttable presumption that it had the support of a majority of employees in the bargaining unit, and that Respondent overcame that presumption based on the testimony of Union state director Hines about union membership and the number of employees who paid union dues. [20] (See R. Posttrial Br. at 1–4.)

Respondent's argument that it did not need to bargain with the Union because the Union lacked majority support fails as a matter of law. As noted above, in *UGL-UNICCO Service Co.*, 357 NLRB 801, the Board reinstated the "successor bar" rule, which entitles a union to a reasonable period of bargaining (at least 6 months, and up to 1 year, depending on the circumstances) that is free from challenges to the union's majority status. Although the Board explained that successor bar rule applies when a successor employer has abided by its legal obligation to recognize an incumbent union, I find that the successor bar also applies in a case like this one, where Respondent did not abide by its legal obligation to recognize the Union (although I note that the "clock" for a reasonable period of bargaining will not start until Respondent and the Union have their first bargaining meeting).

The Board's decision in *UGL-UNICCO Service Co.* compels my finding that Respondent may not challenge the Union's majority status. Indeed, the Union is in precisely the vulnerable position that the Board identified in *UGL-UNICCO Service Co.*, with a successor employer, no contract, and union members who might be inclined to shun the Union because they have a new employer, but has the additional problem of Respondent improperly failing and refusing to recognize and bargain with the Union. See *UGL-UNICCO Service Co.*, 357 NLRB 801, 805–807. Given those circumstances, it is not appropriate to allow Respondent to question the Union's majority status, because such a holding would reward Respondent for unlawfully failing to recognize and bargain with the Union (as established in Analysis sections D and E above). Accordingly, I find that the successor bar rule precludes Respondent from arguing that it does not have to bargain with the Union because the Union lost majority support.

In sum, I find that Respondent violated Section 8(a)(5) and (1) of the Act by, since February 5, 2015, failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit. Respondent is the successor employer to GCA Services, and has an obligation to bargain with the Union because on February 5, 2015, a majority of employees in Respondent's bargaining unit were previously employed by GCA Services and therefore were represented by the Union.

CONCLUSIONS OF LAW

1. By, since February 5, 2015, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

2. By committing the unfair labor practice stated in Conclusion of Law 1 above, Respondent has engaged in unfair labor

[20] In making this argument, Respondent does not claim that it had any evidence of a loss of majority support for the Union (e.g., a decertification petition or some other objective evidence) that led to Respondent's February 11, 2015 decision to decline the Union's February 5, 2015 request to bargain. Cf. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 725 (2001) (explaining, in the context of an employer seeking to unilaterally withdraw recognition from an incumbent union, that an employer may unilaterally withdraw recognition only on a showing that the union has, in fact, lost majority support). Indeed, Respondent has consistently maintained that it did not know the GCA Services employees in question were represented by the Union, and Respondent did not claim in its February 11 letter that the Union had lost majority support (though Respondent did claim that it did not hire a sufficient number of union-represented employees to trigger a duty to bargain). (FOF, Sec. II(F), (I).) Thus, Respondent's argument that the Union lacked majority support is essentially a post hoc justification for Respondent's February 11, 2015 refusal to bargain. I need not reach the merits of Respondent's argument here because, as explained below, Respondent's argument about whether the Union had majority support fails as a matter of law.

practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall order that Respondent recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit and, if an understanding is reached, embody that understanding in a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

Respondent, Empire Janitorial Sales & Service, LLC in Metairie, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize, and on request, bargain with the United Labor Unions, Local 100, as the exclusive collective-bargaining representative of the bargaining unit regarding wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody that understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Metairie, Louisiana, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 5, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. May 16, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the United Labor Unions, Local 100 as the exclusive collective-bargaining representative of the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize, and on request, bargain with the United Labor Unions, Local 100, as the exclusive collective-bargaining representative of the bargaining unit regarding wages, hours and other terms and conditions of employment, and if an understanding is reached, embody that understanding in a signed agreement.

EMPIRE JANITORIAL SALES & SERVICE, LLC

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15–CA–146938 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.